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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DISPATCHED BY

In re Applications of)	GC DOCKET NO. 95-172
)	
RAINBOW BROADCASTING COMPANY)	File No. BMPCT-910625KP
)	File No. BMPCT-910125KE
For an extension of time to construct)	File No. BTCCT-911129KT
)	
and)	
)	
For an Assignment of its construction permit)	
for Station WRBW(TV), Orlando, Florida)	

MEMORANDUM OPINION AND ORDER

Adopted: May 9, 1996 ; Released: May 13, 1996

By the Commission:

1. By this action we authorize the taking of oral depositions of five Commission employees. These Commission employees may be deposed regarding Designated Issue No. 1, which seeks to determine whether Rainbow Broadcasting Company (Rainbow) intentionally violated the Commission's *ex parte* Rules, 47 C.F.R. §§ 1.1208, 1.1210.

BACKGROUND

2. After a comparative hearing the Commission awarded Rainbow a construction permit. Rainbow requested, and received, a series of extensions of time for construction. The Mass Media Bureau denied a sixth such extension of time and cancelled Rainbow's permit. On reconsideration, however, the Bureau granted the extension of time and reinstated the permit. The Commission upheld the decision reinstating the permit and extending Rainbow's construction deadline over the objection of Press Broadcasting Company (Press) that improper *ex parte* contacts had taken place between Rainbow and various Mass Media Bureau personnel. Rainbow Broadcasting Company, 9 FCC Rcd 2839 (1994).

3. In Press Broadcasting Company v. Federal Communications Commission, 59 F.3d 1365 (D.C. Cir. 1995), the United States Court of Appeals for the District of Columbia Circuit determined that the *ex parte* contacts between the representatives of Rainbow and various Bureau personnel did not irrevocably taint the Commission's *de novo* review of this matter. In remanding the proceeding to the Commission, however, the court disagreed with the Commission's determination (based on a report by the Inspector General) that Rainbow

sincerely believed that the proceeding was exempt from the *ex parte* rules.

4. Following the remand, the Commission designated this proceeding for hearing on five issues. Rainbow Broadcasting Company, 11 FCC Rcd 1167 (1995). The specified issues include the following *ex parte* issue (Designated Issue No. 1):

To determine whether Rainbow intentionally violated Sections 1.1208 and 1.1210 of the Commission's *ex parte* rules by soliciting a third party to call the Commission on Rainbow's behalf, and by meeting with Commission staff to discuss the merits of Rainbow's application proceedings.

Id. at 1168 ¶ 9. By Memorandum Opinion and Order, FCC 96M-57 (ALJ Apr. 2, 1996), the presiding Administrative Law Judge determined that the named employees, all of whom had attended the July 1, 1993 meeting referenced in Designated Issue No. 1, have personal knowledge of matters that are relevant under that issue. He therefore authorized the taking of oral depositions, subject to the caveat that Press obtain a special order of the Commission, as is required by 47 C.F.R. § 1.311(b)(2) of the Rules. In doing so, he agreed that the subject matter of the depositions is not readily susceptible to written questions, but he cautioned that questions as to internal communications among Bureau staff are beyond the scope of the designated issue and would not be allowed.

DISCUSSION

5. In its Petition for Special Order Pursuant to Section 1.311(b)(2), Press seeks permission to depose five Commission employees. It relies on the ALJ's affirmative finding that these individuals have knowledge relevant to Designated Issue No. 1, and that oral depositions are appropriate under the circumstances of this case. Press requests further that the Special Order be issued as expeditiously as possible so that the depositions may be conducted at the earliest possible date. Press also states that it will cooperate with these employees and the other parties to schedule the depositions at appropriately convenient dates and times. The Petition is unopposed. For the reasons that follow, we will grant Press' Petition and authorize the taking of oral depositions of these five Commission employees.

6. Section 1.311(b)(2) of the Commission's rules, 47 C.F.R. § 1.311(b)(2), provides that "Commission personnel may not be deposed for purposes of discovery except on special order of the Commission, but may be questioned by written interrogatories under section 1.323." In Scripps Howard Broadcasting Company, 9 FCC Rcd 4880 (1994), the Commission held that it would not entertain requests to depose Commission personnel for discovery purposes, concerning matters related to their employment at the Federal Communications Commission, in the absence of an affirmative finding by the presiding Administrative Law Judge that the proposed examination was relevant to a designated issue in the proceeding.

7. We will authorize the taking of oral depositions of the five named Mass Media Bureau employees. Such depositions are, in our view, reasonably calculated to lead to the discovery of evidence that is admissible under Designated Issue No. 1, as is required under section 1.311(b) of the rules. By its express terms, that issue seeks to determine whether

Rainbow intentionally violated the Commission's *ex parte* rules by soliciting a third party call to the Commission and by meeting with Commission staff to discuss the merits of Rainbow's application proceedings.

8. As the ALJ found, all of the individuals that Press seeks to depose attended the July 1, 1993 meeting that the Bureau had with Rainbow to discuss the merits of Rainbow's request for an extension of the construction deadline. Having attended that meeting, each proposed deponent is in a position to comment from personal knowledge on the substance of any communication, either during the meeting or in scheduling that meeting, between Bureau personnel and Rainbow's representatives as to the applicability of the *ex parte* rules to this matter. Such information is clearly relevant to whether Rainbow believed the contacts to be consistent with the Commission's *ex parte* rules and whether it intentionally violated sections 1.1208 and 1.1210 by soliciting a third party contact on its behalf and by meeting with Bureau staff to discuss the merits of the Bureau's denial of its extension request.

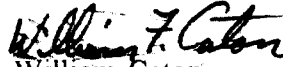
9. We also agree with the ALJ that, although section 1.311(b)(2) contemplates that Commission personnel will generally be questioned by written interrogatories, oral depositions are nevertheless appropriate under the circumstances of this case. In adopting its discovery procedures, the Commission observed that "the written interrogatory may well be the most useful of several procedural devices, since a party may, in one set of interrogatories, obtain an answer to each of his questions from the person best able to furnish it, without time-consuming questioning to determine in advance the particular staff member who has knowledge of the facts." Report and Order of Part I of the Rules of Practice and Procedure to Provide for Discovery Procedures, 11 FCC 2d 185, 188 ¶ 9 (1968).

10. Thus, the Commission intended to avoid time-consuming depositions merely to identify those Commission employees having special responsibility for, as well as personal knowledge of, a particular matter. Here, however, the proposed deponents have personal knowledge of matters relevant to the designated issue by virtue of their presence at the July 1993 meeting that Rainbow and its legal counsel also attended. Written interrogatories are therefore unnecessary to identify these individuals as having personal knowledge of matters that are relevant to the designated issue. And, as eyewitnesses to the presentation made at that meeting, all five are potential witnesses in this proceeding. Under these circumstances, we believe that it is appropriate as a means of expediting the resolution of this proceeding to permit the taking of oral depositions of all five employees at this time.

11. As the ALJ directed, the scope of such depositions should be strictly limited to the substance of any communications between the Bureau's staff and Rainbow or its representatives concerning the applicability, and Rainbow's understanding of the applicability, of the *ex parte* rules to this proceeding. This would, as the ALJ noted, exclude questions concerning communications among Bureau personnel. By the same token, we are confident that the presiding ALJ, in accordance with his broad discretion under 47 C.F.R. § 1.313, will take any action that would be appropriate to avoid any demands on these Bureau personnel that would significantly interfere with their ability to discharge their regular duties.

12. ACCORDINGLY, IT IS ORDERED That the Petition for Special Order Authorizing the Taking of Oral Depositions of Specified Commission Personnel, filed April 5, 1996, by Press Broadcasting IS GRANTED, and that the Oral Depositions ARE AUTHORIZED to the extent reflected herein.

FEDERAL COMMUNICATIONS COMMISSION


William Caton
Acting Secretary